

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF TEXAS  
TEXARKANA DIVISION**

Health Choice Group, LLC and  
Jaime Green, on behalf of the United States  
of America, et al.,

Plaintiffs/Relators,

v.

Bayer Corporation; Amgen Inc.; Onyx  
Pharmaceuticals, Inc.; AmerisourceBergen  
Corporation; and Lash Group,

Defendants.

Civil Action No. 5:17-cv-126-RWS-CMC

**DEFENDANTS' REPLY BRIEF IN SUPPORT OF MOTION TO STAY DISCOVERY**

Discovery should be stayed in this case until Relator Health Choice Group, LLC ("HCG")<sup>1</sup> files an amended complaint in this action that complies with Federal Rule 9(b). Defendants' opening brief provided numerous reasons for the requested stay, and HCG's opposition does not attempt to dispute any of them. Specifically, HCG did not dispute that:

- The current complaint fails to satisfy the pleading requirements of Rule 9(b). Dkt. 92 at 6;
- The Fifth Circuit has stated that, in similar circumstances, a plaintiff is not entitled to discovery until the plaintiff satisfies Rule 9(b). *Id.* at 2, 4-5 (citing *U.S. ex rel. Grubbs v. Kanneganti*, 565 F.3d 180, 185 (5th Cir. 2009) ("Rule 9(b) has long played that screening function, standing as a gatekeeper to discovery....")); and
- HCG will not be prejudiced by the requested stay, yet the stay would avoid an undue burden on Defendants. *Id.* at 6-8.

Rather than challenge any of the bases for the requested stay, HCG's only response is that it is "diligently working to amend the First Amended Complaint...." Dkt. 96 at 1. This does not

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<sup>1</sup> Defendants acknowledge two relators remain in this action because Relator Jaime Green has not been dismissed by this Court per Magistrate Judge Craven's Report and Recommendation. Relators, however, did not object to that finding and recommendation and apparently will proceed only with HCG as the sole relator.

address or contradict the authority from Defendants' motion. To the contrary, it provides further support for a stay of discovery. HCG's assertion is that it will soon file an amended complaint, if permitted by this Court. If that complaint satisfies all pleading requirements, including Rule 9(b)'s requirements, discovery can continue. But HCG offers no argument why a stay is not appropriate until that time.

HCG's actions also show that a stay of discovery is appropriate. After Magistrate Judge Craven's Report and Recommendation of dismissal, Relators have ceased adhering to their discovery obligations. Only days ago on July 25, Defendants produced their lists of potential e-mail custodians, as required by the Court's E-Discovery Order (Dkt. 63) and the parties' agreement. Despite agreeing to a mutual exchange of e-mail custodian lists, Relators failed to produce their list on July 25. Indeed, Defendants still have not heard from Relators regarding this required production, and have not even received a request from Relators for an extension.

In short, HCG has not articulated a reason why the parties should continue with discovery while the Report and Recommendation is pending, and, if adopted, until HCG submits a pleading sufficient for this case to proceed. No party would be prejudiced by the requested stay, and it would preserve the parties' resources until they know which, if any, of HCG's allegations will remain the proper subject of discovery. Granting the stay would further the discovery gatekeeper purpose of Rule 9(b).

Dated: July 30, 2018

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing document was filed electronically in compliance with Local Rule CV-5(a). Therefore, this document was served on all counsel who are deemed to have consented to electronic service. Local Rule CV-5(a)(3)(A). Pursuant to Fed. R. Civ. P. 5(d) and Local Rule CV-5(d) and (e), all other counsel of record not deemed to have consented to electronic service were served with a true and correct copy of the foregoing by email on this the 30th day of July, 2018.

/s/ Claire Henry